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RECKONING FOR LEGAL SERVICES: A CASE STUDY OF LEGAL ASSISTANCE IN INDIAN EDUCATION*

Michael Paul Gross**

Qui Custodiet Ipsos Custodes?

I. Introduction

In 1966, as part of the War on Poverty, the Office of Economic Opportunity (OEO) dispatched hundreds of young lawyers to ghettos, Appalachian hollows, and Indian reservations "not simply to get poor people out of a specific jam," according to R. Sargent Shriver, OEO's first director, "but to get them out of poverty once and for all."¹

Seven years later a reckoning for these lawyers is at hand. Congress is presently considering H. R. 7824, a bill providing for a legal services corporation to oversee the 2,500 lawyers in 900 separate projects around the country.² But along with the question whether there will be a program is the equally important one of what kind of program it will be.

Although the issue shaping up in Congress relates to political controls over the program, its resolution will not entirely settle the question of what kind of program emerges. This is because throughout most of its existence, OEO legal services programs have been enveloped in political imbroglios which have rendered discussion of legal assistance to the poor ideological. The result has been a rhetorical war. Vice-President Agnew, a leading critic, writing in the September, 1972, issue of the *American Bar Association Journal*, calls legal services "a federally funded system manned by ideological vigilantes" who are engaged in "a systematic effort to redistribute societal advantages and disadvantages, penalties and rewards, rights and resources."³ Governor Ronald Reagan joins in by calling poverty lawyers "ideological ambulance chasers."⁴

The program's supporters, mostly members of the Bar, have responded in kind. In January, 1971, *The Washington Monthly* stated that "the work of the poverty lawyers has been a rare, multi-faceted success in the war on poverty."⁵ The ACLU's newspaper, *Civil Liberties*, calls the OEO legal program "one of

* Since receiving this article for publication, significant differing viewpoints concerning the merits of the programs discussed have come to our attention. We present this article to promote discussion of the issues raised by this disagreement. The views expressed do not necessarily represent the views of the Editors or the Notre Dame Law School. For further information concerning opposing views, contact the Notre Dame Lawyer; Box 486; Notre Dame, Indiana 46556.

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1 Shriver, *The OEO and Legal Services*, 51 A.B.A.J. 1064 (1965).

2 TRB, *Robin Hood in Reverse*, THE NEW REPUBLIC, Mar. 3, 1973, at 4; 18 AMERICAN BAR NEWS, No. 7, Jul. 1973, at 1.

3 Agnew, *What's Wrong with the Legal Services Program?* 58 A.B.A.J. 930, 931 (1972).

4 TRB, *supra* note 2.

5 T. Branch, *The Ordeal of Legal Services: How Poor People Won in Court But Lost in OEO*, THE WASHINGTON MONTHLY, Jan., 1971, at 5.

the few truly effective programs ever organized to procure equal justice."⁶ The Chairman of the ABA's Standing Committee on Legal Aid, William R. Klaus, calls it "an innovative, courageous and historic experiment in social justice."⁷ Even *The New York Times* editorializes it as "the most innovative of O.E.O. programs."⁸

Common to all of these comments, those of both the left and the right, is the universal absence of the views of the poor. Thus if legal services are to receive a full, fair and constructive hearing—if the program is to emerge not only intact but strengthened in its ability to help the poor—then the debate must change. Hard facts must replace invective.

Above all, Congress and the new legal services corporation (if any is effected) must listen to the poor, who have been largely voiceless in the past. After all, by their continued presence the poor symbolize the failure, at least on a statistical level, of the entire war on poverty. William Greider and Nick Kotz of *The Washington Post* report, for example (quoting a former census official), that "if the index (of poverty) accurately reflected rising costs of living, it would show around 40 million people below the line of bare subsistence—unchanged from a decade ago."⁹ But statistics provide only one dimension. Equally important are the mental state and spirit of the poor—what Edgar S. and Jean Camper Cahn, two theoreticians of the poverty war, have described as "the mentality of despair, apathy, passivity and the vulnerability to exploitation, harassment and manipulation."¹⁰ On this psychological front the record of OEO may not be so bleak. At any rate, no assessment can be made without listening to the poor speaking for themselves from what the Cahns called "the civilian perspective," a phrase recalling the military rhetoric popular in the early days of the war on poverty.¹¹

I cannot speak for the poor. But I can perhaps offer the beginnings of a case study of how OEO legal programs have dealt with one unheralded, though important, area of poverty law—Indian education. Perhaps by examining this one field, some directions for an overall inquiry can be detected.¹² I suspect that this inquiry will necessarily focus on the nature and quality of the attorney-client relationship as they exist in these programs and on their interrelationship with program structures. This conclusion is drawn from the observation that, while sometimes performing badly needed functions in individual cases, organized legal services, especially those administering an "Indian Education Legal Sup-

6 A. Schardt, *Washington Report: Saving Legal Services*, CIVIL LIBERTIES, May, 1973, at 3.

7 Klaus, *Legal Services Program: Reply to Vice President Agnew*, 58 A.B.A.J., 1178 (1972).

8 Editorial, *The New York Times*, Apr. 6, 1973 at 40.

9 Greider & Kotz, *A Passion for Equality*, *The Washington Post*, Apr. 9, 1973, at A14.

10 Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1322 (1964).

11 *Id.* at 1321.

12 Of course reasoning from the specific case of Indian education to all of poverty law would be erroneous. But my aim is not to be scientific or conclusive; it is simply to record some personal observations and experiences in hopes of jogging discussion of legal services from the ideological level ("can't we all agree that elimination of poverty in this country ought to be a priority?") to the question of what the program is really doing. In this sense Indian education may be a microcosm of all legal services and may be used as a basis for further investigation.

port Project" funded by OEO, have failed to respond adequately to the crucial need in the field: increased participation in and control over school programs by Indians. Because of their structures, techniques and philosophies—all rooted in the American eleemosynary tradition—these programs have generally reinforced the basic flaw in the system for educating Indians: dependence on whites. As with other charities, poverty law programs in Indian education and elsewhere share a common element—almost none are run by their beneficiaries. The lawyers remain their own bosses. And thus, in the first instance, they have failed to alter their own relationships with the poor.

Due to the manner in which these programs are controlled, they have been able to do "good" only by way of charity. This aid has suffered from a psychological infirmity common to many interracial, interclass, intercultural gifts: the infirmity inherent when masters do something for slaves. Social reform cannot succeed in that fashion: "Historically, the Negro steeped in the inessentiality of servitude was set free by his master. He did not first gain his freedom," wrote Frantz Fanon.¹³

"One day a good white master who had influence said to his friends, 'let's be nice to the niggers. . . .' The other masters argued, for after all it was not an easy thing, but then they decided to promote the machine-men to the supreme rank of *men*.

"The upheaval reached the Negroes from without. The black man was acted upon. Values that had not been created by his actions, values that had not been born of the systaltic tide of his blood, danced in a whirl around him. The upheaval did not make a difference in the Negro. He went from one way of life to another, but not from one life to another."¹⁴

As long as legal services programs and lawyers, however well intentioned, continue to exercise initiative over the lives and interests of Indians (and others), they will remain basically unproductive.

II. Indian Education—Control of Schools

A. *The General Pattern*

In Indian education the failure of legal services programs and lawyers is suggested by one telling statistic: the woefully small number of schools controlled by Indians. In 1966 a Navajo community at Rough Rock, deep inside the vast Navajo Reservation in Arizona, became the first Indian community in modern times to run its own school.¹⁵ Three years later it had not a single successor. But in that same year, a Special Senate Subcommittee on Indian Education, after exhaustive investigation, recommended "that similar demonstration schools be established and appropriately funded on other Indian reserva-

¹³ F. FANON, *BLACK SKIN, WHITE MASKS* 219 (1967).

¹⁴ *Id.*

¹⁵ The Bureau of Indian Affairs and OEO jointly funded the program as a "demonstration" of the capacity of an Indian community to run its own school and of the value of instructing Navajo students in a Navajo environment with a Navajo-oriented curriculum. *See generally*, INDIAN EDUCATION: A NATIONAL TRAGEDY — A NATIONAL CHALLENGE, S. Rep. No. 501, 91st Cong., 1st Sess. (1969) [hereinafter cited as Senate Rept.].

tions."¹⁶ It also recommended that "Indian parental and community involvement be increased" in all schools for Indians.¹⁷ It came to this conclusion after certifying Indian education as a national tragedy.¹⁸

Both the Special Senate Subcommittee on Indian Education (whose chairmen have included Senators Robert Kennedy, Wayne Morse, and Edward Kennedy) and the President agreed on the extent of the failures:

Dropout rates are twice the national average in both public and Federal schools. Some school districts have dropout rates approaching 100 percent. Achievement levels of Indian children are two to three years below those of white students; and the Indian child falls progressively further behind the longer he stays in school.

Only one percent of Indian children in elementary school have Indian teachers or principals.

One-fourth of elementary and secondary school teachers—*by their own admission* [Subcommittee's emphasis]—would prefer *not* to teach Indian children; and Indian children, more than any other minority group, believe themselves to be "below average" in intelligence.¹⁹

The Subcommittee pinpointed the single factor chiefly responsible for this massive tragedy: "The Indian is despised, exploited, and discriminated against . . . but always held in check by the white power structure so that his situation will not change."²⁰ Agreeing with these revelations, the President in 1970 adopted a new policy for Indian education:

Consistent with our policy that the Indian community should have a right to take over the control and operation of federally funded programs, we believe every Indian community wishing to do so should be able to control its own Indian schools.²¹

Yet four years after the Subcommittee's Report, three years after the Nixon Message, and two years after OEO funded a \$250,000, two-year Indian Education Legal Support project,²² the number of Indian-run schools remains minuscule. Today only about 12 schools are recognized by the Bureau of Indian Affairs as Indian-controlled (although there are several more community projects in scattered locations struggling to run alternative schools for Indians, and some previously white-controlled school districts are now operated under boards with Indian majorities).²³ Total enrollment in Indian-controlled schools is

16 *Id.* at 129.

17 *Id.* at 119.

18 *Id.* at x.

19 *Id.* at ix.

20 *Id.* at 24.

21 116 CONG. REC. 23131, 23133 (1970) (President Richard M. Nixon's Message to Congress).

22 The program has been refunded for an interim period extending to October 31, 1973. (Interview with Nancy Pettis, OEO Program Analyst, Aug. 6, 1973.) When funded in 1971 the project was based on the legal services model, although it was not technically a Legal Services Branch program. Instead the funds came from OEO's Office of Program Development (OPD). As explained by the OEO program analyst in charge of the grant at the time, the grant was channeled in this manner to avoid submitting it to possible veto by the governors of the states in which the project was to operate. Such submission was a requirement for legal services grants but not for "research projects" funded through universities.

23 Interview with James E. Hawkins, Director of BIA Education Programs, early spring, 1973.

estimated at only 1.25 percent of all Indian students.²⁴ The BIA's own budget provides only \$4.5 million for so-called Indian Contract Schools, compared with \$180 million for the rest of the BIA's education program.²⁵

Much of the blame for this tardiness rests of course with the Government's bureaucracy, not overly anxious to turn itself over to Indians. But it remains undeniable that a more vigorous effort by OEO programs through the Indian Education Legal Support Project and regular legal services programs to carry out a mandate for Indian self-determination would have led to many more breakthroughs. Instead of assisting grass-roots Indian school boards to organize themselves, get funding, and start operating their own schools as intended, OEO programs have by and large carried on a traditional legal aid operation, principally dependent upon lawsuits.

Sadly, the discrepancy between mandate and performance has advanced so far that some OEO programs find themselves in open competition for funds and prestige with many of their own client school boards, committees, or groups. In late 1971 many of these clients united to form the first national grass-roots Indian education organization—the Coalition of Indian-Controlled School Boards—created to speed up the transfer of educational programs to Indians.²⁶ By reason primarily of organizational rivalries, the two grantees of the OEO Indian education legal grant have reacted to the Coalition with suspicion and a touch of jealousy.

Divergence of interests between Indians and legal aid first became apparent to me while working for Dinebeina Nahiilna Be Agaditahe, Inc. (DNA), an OEO program for Navajos.^{26.1} The name means "Lawyers who work for the Economic Revitalization of the People." It took about a year to discern a general pattern of assistance. All of our clients were forced to come to DNA and leave solution to their problems in Anglo hands. Rarely did DNA lawyers meaningfully consult their clients about cases once the facts were established. Decisions were effectively left to newly graduated lawyers who assured clients that all would be taken care of.

Despite our firm belief in the "radical" nature of DNA, ours was a system which closely resembled forms of aid previously available on the reservation through missionaries, schoolteachers and, of course, the forerunner of OEO for Indians, the Bureau of Indian Affairs. Even our internal structure paralleled earlier Anglo charitable enterprises for Indians. Just as the churches and the BIA were in the habit of hiring squadrons of Indians to fill low-level positions, so too did DNA have a corps of "interpreters/counselors," all Navajo, who acted as investigators, translators and lay advocates for Indians. These 20

²⁴ *Budget Justification for Fiscal Year 1974*, U.S. Dept. of the Interior, Bureau of Indian Affairs, p. 1A-3. (This figure does not include Indian Students in public school districts controlled by Indian-majority school boards.)

²⁵ Hawkins, *supra* note 23.

²⁶ Greider, *Indian Runaround*, The Washington Post, Nov. 7, 1971, at B3.

^{26.1} DNA is distinguishable from NARF and Harvard in the sense that DNA is a field legal services program and handles ordinary legal aid cases as well as test cases usually referred to as law reform. DNA had no part in soliciting the funds for or the administration of the funds for the Legal Education Support project. In at least two cases, *Natonabah v. Gallup-McKinley County Board of Education*, 355 F. Supp. 716 (D.N.M. 1973), and *Denetclarence v. Independent School Dist. No. 22*, filed in New Mexico Federal District Court, DNA joined with Harvard and NARF in filing major Indian education cases.

Navajos did a remarkable job in expanding the range of DNA's services, but they were all subordinate, in a practical sense, to the 20 attorneys, who outranked them in prestige and pay. Conditions may have improved since my days at DNA.^{26,2}

In short, our activities were virtually indistinguishable from previous Anglo benevolence—all well-intentioned no doubt but as useful in changing colonialistic behavior as the yearly Christmas presents delivered to the Navajos by the U.S. Air Force. Instead of reforming relationships between oppressed poor people and the dominant rich, DNA lawyers, with their law suits, legal jargon, and aggressive personalities, were actually reinforcing Navajo dependence on whites.

B. *The Ramah Example*

A case at DNA in which I was involved, eventually produced a different model for legal assistance. It concerned a remote, windswept, western New Mexico Navajo settlement at Ramah. In June, 1968, a public school district closed the only high school in the area. Without a local school Navajo students faced the prospect of leaving home for nine months each year to attend distant federal boarding schools (which the Senate Subcommittee described as "custodial institutions at best, and repressive, penal institutions at worst").²⁷

Upon getting the case, DNA filed a lawsuit.²⁸ For a year and a half DNA tried without success to force reopening of the Ramah school. Although we had a sympathetic judge and what we thought was a strong legal argument, the complexities of law and politics deprived us of a significant victory in court. So, the Navajo students remained in boarding schools. Their situation looked hopeless.

Then something remarkable happened. The Ramah Navajo community—1,500 impoverished, illiterate, non-English-speaking, isolated Indians—decided to found their own school. No other Indian community in this century had attempted to do this. Even Rough Rock had been conceived and planned by experts external to the community—mostly non-Indians—who developed a plan and then suggested that the community run the school. Even the facilities of a brand-new BIA boarding school had been available for the project.²⁹ But at Ramah, local members of an Indian community decided to start their own school from scratch.³⁰

26.2 Since my days at DNA two Navajo laymen have occupied the director's position. Given the organization's continuing emphasis on legal training, it would seem unlikely that internal dynamics relating to the counselors would change greatly as a result; but according to Peterson Zah, a Navajo and DNA's current director, 75% of DNA's counselors now, through periodic pay raises, make as much as the average lawyer's salary. OEO has conditioned continued funding of the program on enlarging the influence in the program of local bar associations, traditionally hostile to legal services programs. Many of DNA's problems while I was there stemmed too from internal dissensions generally ascribed to the aggressive personality of the non-Indian director. Zah says that since his replacement, internal relations have improved and the result has benefited the program as a whole.

27 Senate Rept., *supra* note 15, at 103.

28 Ben Jose v. Gallup-McKinley County School Board, 12913 - Civil (N.M. 11th J.D. 1968).

29 D. ERICKSON & H. SCHWARTZ, COMMUNITY SCHOOL AT ROUGH ROCK: AN EVALUATION FOR THE OFFICE OF ECONOMIC OPPORTUNITY (Contract No. B89-4534 at 2.15-2.18) (1969).

30 *Washington Post*, April 19, 1970, at A 19.

Merely to say that the Ramah people succeeded, that seven months after starting out they opened their own school with 130 of their children home from boarding school, cannot possibly convey what really happened. Ramah was transformed. A previously passive, subservient people, forced into docility by the U.S. Cavalry in the 19th century, seized the initiative to change their lives.

Admittedly, the Ramah Navajo School Board had outside help; but the assistance was provided on Ramah's terms and mostly at Ramah's expense. That made it possible for the Ramah Navajo School Board to do what a team of Ivy League lawyers had failed to do in almost two years; i.e., return a school to its community.

The Ramah example suggested that in Indian education traditional methods of legal service relying on lawyers doing something *for* people were not as effective as methods promoting self-help. And equally important, it showed that lawsuits in Indian education may not be generally useful in bringing about true reform. Even if DNA had succeeded in reopening Ramah high school, it still would have been under non-Indian, and consequently unresponsive, control.

Because of the shocking facts revealed by the Special Senate Subcommittee, and the subsequent successes of Ramah, Rough Rock, and of Navajo Community College, the first Indian-run college, public attention in the early 1970's was attracted to Indian education. The President's Message called attention to the exciting developments at these schools. TV networks journeyed to the remote reaches of Navajoland to produce documentaries about little Navajo children going to school in their own communities and receiving instruction in their own language. Streams of youthful students flowed to the schools as volunteers and interns. It was, therefore, not suprising to discover that Indian education came to the attention of the wealthy board rooms of several large foundations.

III. Foundation Grants

In early 1970 two private civil rights organizations, long involved in educational issues, the NAACP Legal Defense and Education Fund, Inc. and the Harvard Center for Law and Education, began to produce a report on abuses of federal funding of Indian education in public school districts where about two-thirds of Indian children are enrolled. *An Even Chance*, as this report was called, appeared in late 1970.³¹ Several months later, in June, 1971, OEO made a grant of \$249,999 for a two-year, two-month period to the Center for Law and Education at Harvard and to the Native American Rights Fund (NARF) of Boulder, Colorado, for the "Indian Education Legal Support Program." Harvard and NARF were to operate the project jointly, Harvard as an arm of the Harvard Graduate School of Education and of the Harvard Law School, and NARF, as a Ford Foundation-funded equivalent to the NAACP, Inc. Fund. The grant marked the first federal or private money in any significant amount to be directed toward legal assistance in Indian education.³² What help Indians

31 NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. WITH THE COOPERATION OF THE CENTER FOR LAW AND EDUCATION, HARVARD UNIVERSITY, *AN EVEN CHANCE: A REPORT ON FEDERAL FUNDS FOR INDIAN CHILDREN IN PUBLIC SCHOOL DISTRICTS* (1971).

32 Interview with Nancy Pettis, *supra* note 22.

obtained prior to this grant had to be sought haphazardly from legal services programs with general mandates, such as DNA, on Indian reservations, or urban centers, or from the private bar.

Although there is some dispute on this point, it seems clear from the grant documents, and especially from the joint proposal submitted by Harvard and NARF to OEO, that the project's principal purpose was to underscore the ever-mounting Indian campaign for control of schools:

The primary focus of efforts to improve Indian education should be community organization on reservations (federal and "state" reservations) and in off-reservation areas of high Indian concentration. Lawyers can provide vitally needed support to community people attempting to improve the quality of their children's education.³³

Toward this end, both NARF and Harvard made very clear their intention to expend the project funds in innovative ways largely derived from the legal services experience at Ramah:

The hypothesis upon which the proposed program would be based is that lawyers can furnish significant and necessary research and support to communities engaged in improvement of Indian education through technical assistance as well as bringing lawsuits

Indeed the most useful work that lawyers can do is likely not to be litigation, but rather ongoing support and counsel for efforts of local communities.³⁴

In later progress reports this emphasis on the importance of community control and organizing is repeated: "Perhaps the most exciting development in the field of Indian education is the movement for local Indian control of Indian education."³⁵

IV. The Results of the Grants

An examination of the November, 1972, progress report from Harvard and NARF to OEO suggests that to a large extent the money has not been used in these ways. Of approximately 36 cases, projects, or matters mentioned, fully 14 are lawsuits. Three others are administrative proceedings of an adversary nature which could lead to lawsuits. Four are legislative and legal monitoring activities which generally engage lawyers in traditionally argumentative or legalistic ways. One was a two-month effort by a project attorney to write a definitive law review article on Indian education. Ten are claimed as community-controlled projects, although the actual amount of time spent on them is not revealed (as it is not for any of the other items except for one law suit for which it is said: "The Center spent more than a full month preparing for and

³³ From project proposals for the grant submitted by the Center for Law and Education, David L. Kirp, Director, and the Native American Rights Fund, David H. Getches, Director, undated, Spring, 1971.

³⁴ *Id.*

³⁵ INDIAN EDUCATION LEGAL SUPPORT PROJECT, CENTER FOR LAW AND EDUCATION AND NATIVE AMERICAN RIGHTS FUND, REPORT FOR NOVEMBER, 1972.

conducting the trial which was held in Albuquerque the week of July 19. More than 200 exhibits were offered in evidence by plaintiffs. Posttrial briefs and proposed findings of fact and conclusions of law have been filed by all parties"). The remaining projects involve compilation of statistics on Indian education, preparing a synopsis of the legislative history for an important Indian education law, assemblage of an "Indian education packet" for "legal services offices and other Indian educational organizations," newsletters, and assistance to established Indian education organizations and tribes. At no point in the 68-page, legal-size document is there a single quote from clients showing their feelings about the project; nor has OEO conducted an evaluation of the program. NARF and Harvard lawyers wrote the piece themselves.³⁶

This report, massive as it is, can give only a surface impression of how the project has operated and how effective it has been. The document itself fails to list the amount of time or money spent on any single item. But, in general, if one can assume that the average law suit of the kind brought by the project demands at least 300-500 hours of professional time, it is not an exaggerated estimate to suppose that the 14 lawsuits mentioned in the report alone consumed over half the funds for the project and probably most of the time of the three lawyers employed pursuant to the grant. In short, the original emphasis on non-litigious methods of using lawyers for Indian education appears somehow to have been lost. On the basis of this report it seems that the project, like the DNA of my experience, has remained rooted in old-fashioned adversarial molds.

Statistics alone can never tell the full story of a social program; subjective analysis is essential for any accurate evaluation. Such an evaluation might be based on several examples of how the Indian Education Legal Support Project has operated.³⁷ Only in this way can a beginning be made to relate this project to self-determination in education. Self-determination has been recognized by Indians, the Special Senate Subcommittee, the President, and OEO as the single most pressing need in Indian education. (I do not and could not conduct a thorough evaluation of the project myself, and this little exercise should not be interpreted as such. My aim is rather to establish a framework around which social projects of this kind should be viewed and judged. It is an exercise in determining when a program ceases being a rich man's charity and starts being a poor man's weapon.)

A. Consultation with Indians in Securing Grants

Despite the powerful rhetoric in the joint proposal about Indian self-determination and community control, Harvard and NARF solicited and secured the grant without informing or consulting with any recognized Indian organization or group other than a small Indian consulting team with little experience in Indian education.³⁸ Not even the Indian board or task force

³⁶ *Id.*

³⁷ Comments about events which follow are from the author's personal knowledge unless otherwise noted.

³⁸ Acknowledged in letter to OEO dated May 18, 1972, and signed David H. Getches. The Indian consulting organization was the National Indian Training and Research Center of Tempe, Arizona (NITRC). At the same time that NARF and Harvard were given their

associated with each of the two organizations was told of the impending project. The directors of the organizations simply formulated a proposal, and presented it to a receptive contact at OEO. All was done behind closed doors—a technique which used to be characteristic of OEO, and which depended on an “old boy network” of people who can be said to have constituted a national poverty law establishment. The impetus for the proposal came from *An Even Chance*,³⁹ which once again attracted the media to the plight of helpless Indians. Successful grantsmanship in the OEO experience has often turned on reports of this kind that, by setting out the problem, invite a grant of funds to solve it.

The point to be made is that this usual and nondevious device for soliciting funds from OEO in this instance directly contradicted the philosophy and purpose of the proposed project itself. Thus, the grant which followed to help solve the problem of lack of Indian control actually exemplified it. As later events suggest, mere insertion into the document of rhetoric endorsing innovative uses of lawyers in a program promoting self-help has not been sufficient to prevent the project from reverting to standard legal aid practices. The way in which the project was funded probably greatly influenced its operation.

B. Natonabah v. Gallup-McKinley County Board of Education

The very first matter mentioned in the November, 1972, progress report is *Natonabah v. Gallup-McKinley County Board of Education*,⁴⁰ a New Mexico case in which DNA, NARF, and Harvard joined to challenge discriminatory practices against Indians. This challenge was based largely on the misuse of federal funds exposed in *An Even Chance*. At the time of the progress report, the case had yet to be decided, but several months later the United States District Court of New Mexico issued an opinion finding that “there has been a clear pattern of discrimination against the Indian students in the Gallup-McKinley County School District in capital outlays and operational expenditures and there has been a diversion of Title I and Johnson-O’Malley funds for purposes for which they were not intended.”⁴¹ This victory is generally considered the Legal

\$249,999 grant, NITRC received a grant of \$199,733 for an eleven-month period to offer community development assistance to Indian groups in conjunction with the Legal Support Project. Special Condition Number 1 of this grant appearing on CAP Form 29, July 1, 1971, reads:

The grantee shall work cooperatively with and take into consideration educational programs and efforts being conducted by the Educational Legal Back-Up Center and Special Indian Education Demonstration, e.g., Navajo Community College, Ramah High School and Rough Rock Demonstration School.

Yet at no time, according to Abe Plummer, Director of Ramah Navajo High School (*infra* note 49), did NITRC or OEO consult Ramah about this community assistance project or even tell it that such a program of assistance would be available. In fact, reports Plummer, there has to this date been no NITRC aid for Ramah of any kind. The author has no knowledge of whether NITRC gave assistance to either of the other two schools mentioned in the Special Condition.

39 Reference made to *AN EVEN CHANCE* in the Joint Project Proposal, *supra* note 33, at 1.

40 355 F. Supp. 716, 718 (D.N.M. 1973); a similar case arising in the Shiprock, New Mexico, public school district on the Navajo Reservation is *Deneclarence v. Independent School Dist. No. 22*, which has been filed in New Mexico Federal District Court and has not yet gone to trial. The fact that Natonabah is accompanied by yet another case raising the same issues merely highlights the waste of professional time and grant funds by NARF, Harvard and DNA, which is the principal criticism of Natonabah.

41 *Id.* at 733.

Support Project's crowning achievement.⁴² On closer examination a different verdict may be appropriate.

In late 1970 DNA filed the suit on behalf of Indian students against the State Department of Education, the United States Departments of the Interior and of Health, Education and Welfare, and the Gallup-McKinley district, which has more Indian students than any other school system in the country (7,000). After the Legal Support Project was funded, Harvard and NARF became involved in the suit and eventually assumed command of it. (The comments cited above of the November, 1972, progress report relative to time and energy invested in the Albuquerque trial are pursuant to this case.)⁴³

The action focused on one of just those quantifiable, surface aspects of Indian miseducation—misuse of money—which I suspect diverts attention from underlying causes of the Indian education tragedy. For example, the entire 17-page opinion is devoid of all but a passing reference to educational substance. It is a suit based on economic statistics. From the court's opinion one can scarcely glean the terrible psychological traumas which must be visited on Indian children in the district who are forced by subtle, and sometimes not so subtle, means to abandon their Indian culture. Nowhere is there mention of the high Indian dropout or pushout rate. Nowhere is there mention of how professional educational services for Indian children can be improved. Nowhere is there mention of the exciting developments in the districts around Gallup-McKinley such as those at Ramah.

And what was the suit's practical outcome? The court ordered the local district, the sole remaining defendant after the federal and state defendants were dismissed or found faultless, to come up with a plan "designed to overcome the disparities existing because of the unequal allocation of construction and operational funds."⁴⁴ The underlying assumption, never explicitly stated but pervasive nevertheless, is that provision of "equal" state resources and proper use of federal compensatory funds for Indian education will suffice to overcome the incredible failures of learning and teaching in these public schools.

That assumption is not borne out elsewhere. Even where Indian students attend the same school facilities, share in use of the same equipment as non-Indians, and are the beneficiaries, by and large, of special funds for their education such as in Fremont County, Wyoming, where Indian students attend off-reservation, non-Indian-controlled high schools, educational failures continue. Indian students in the two off-reservation high schools in Fremont County are reported to withdraw from school in the same numbers as those of Indians elsewhere and to suffer from the same low-achievement levels.⁴⁵

There is a further irony in *Natonabah*—the parties. Since the early days of the suit, the defendant local district has been governed by a board with a majority of Indians who are all named in the suit and sued both individually

42 *E.g.* telephone conversation with NARF attorney, early April, 1973.

43 355 F. Supp. 716, 719 (D.N.M. 1973).

44 *Id.* at 725.

45 L. MURRAY, COORDINATOR, JOHNSON O'MALLEY PLAN FOR WYOMING, ANNUAL REPORT (1972).

and in their official capacities.⁴⁶ NARF, Harvard, and DNA spent two years suing an Indian-controlled school board!⁴⁷

Justification for this strange twist is alluded to in a brief remark by the court:

The evidence is convincing that the current school board [not identified as Indian-controlled] for the district is dedicated to preventing any inequities in the allocation of the district's resources. There is no certainty, however, as to how long the present board might serve or what the composition of the board will be at any given time.⁴⁸

In other words, rather than find ways to ensure that Navajos and Zunis in the Gallup-McKinley district would be able to control their children's educations indefinitely, NARF, Harvard and DNA proceeded on the assumption that Indian control of the district would one day end. Their suit recognizes a necessity for making recalcitrant non-Indians more responsive to Indian needs. It is the same impulse which other Indian benefactors have shown—a desire to reform the ways non-Indians do things *for* Indians. It is a pattern which studiously avoids the central issue: the means by which the dominant society retains control over the affairs of the aggrieved.

Perhaps the worst single consequence of the suit, however, is the lawyers' failure to coordinate their legal endeavors with the Indian community. Abe Plummer, a Navajo member of the Gallup board (and a national Indian education leader by virtue of his positions as Director of Ramah Navajo High School and Vice-President of the Coalition of Indian Controlled School Boards) asserts that there had been a very definite strategy by the Indian community through the Indian-controlled board surrounding the suit.⁴⁹ It was a strategy to gain control over the system's administration, a largely non-Indian group which Plummer considers chiefly responsible for the low level of Indian education in the district. In his mind the suit could have become a very powerful weapon in the hands of the Navajo majority on the board against the bureaucrats. But this strategy demanded close coordination and cooperation between the plaintiffs' lawyers and the Navajo board members. That did not occur.

"Zero," replied Plummer to the question of how much time NARF, Harvard, and DNA spent consulting either with him or the other members of the board during the suit. To this day, he says, no one has explained the judge's opinion to the board, let alone begun working with it to develop constructive ways to comply with the court's order.⁵⁰

46 355 F. Supp. 716 (D.N.M. 1973).

47 It is conceivable that an Indian-controlled school board could misuse funds and discriminate against certain of its students. But in the Gallup case this was manifestly not true. In late December 1970 and January 1971, just before the Gallup-McKinley County school board elections, the word was that several Navajos, for the first time, would be making a concerted effort to gain seats on the board. Both of the leading Navajo contenders, who later won places, John Martin and Abe Plummer, ran on reformist platforms which decried prior discrimination against Indian students in the district. Yet DNA failed to wait until after the outcome of the election to file its lawsuit.

48 *Id.* at 724-25.

49 Interview with Abe Plummer, April 17, 1973. The existence of this strategy is also acknowledged by the DNA attorney who filed the lawsuit.

50 *Id.*

The suit's most probable outcome is revealed in this assessment by the court:

It is obvious that the filing of the action has been a strong influence to cause investigation to be made and corrective action to be taken at all levels of government. By filing suit, the plaintiffs have focused attention on the problems and have caused the beginning, through the administrative process, of the reforms they seek.⁵¹

Yet that assessment seems in sharp contrast to the President's own views expressed on July 8, 1970:

One of the saddest aspects of Indian life in the United States is the low quality of Indian education. . . . Again, at least a part of the problem stems from the fact that the Federal government is trying to do for Indians what many Indians could do better for themselves.⁵²

Because it overlooks these broader realities, founded on a whole history of forced Indian subservience, the court's opinion lends itself to an inference that this was indeed a lawyer's case and a lawyer's remedy. A NARF attorney later conceded that the resolution of the case would not result in new schools in the immediate future.⁵³ In brief, although the misallocation of resources for Indians and the disparity of facilities and equipment focused on in *Natonabah* certainly exist in many places, they are but the tip of a colossal iceberg of indifference to Indian needs and wishes which cannot be melted down by turning a legal blowtorch on the upper reaches.

C. NARF and Harvard's Relations with the Coalition of Indian Controlled School Boards

The NARF-Harvard penchant for litigation is revealed in still another episode. This one further reflects the two organizations' attitudes toward Indian clients, at least to the extent of showing how difficult it has been for the organizations to translate intentions into action.

In the fall of 1971, a few months after the Indian Education Legal Support Project began, the Bureau of Indian Affairs slid into a retrenchment from the President's policy of Indian self-determination. Several Indian communities had submitted detailed proposals for contracts to run their own schools, but were being repeatedly put off for bureaucratic reasons.⁵⁴ In frustration, four of them—mostly NARF clients—assembled at NARF's headquarters to discuss joint action to shake up the BIA. This was the start of the Coalition of Indian Controlled School Boards, now numbering over 100 members around the country.

With political savvy and shrewd use of public relations these nonprofessionals succeeded in forcing BIA action. They managed to get William Greider of *The Washington Post* to write a feature column on their situation. The article quoted promises of funds made by the Commissioner of Indian Affairs.⁵⁵

51 355 F. Supp. 716, 731 (D.N.M. 1973).

52 President Richard M. Nixon's Message to Congress, *supra* note 21.

53 Conversation, *supra* note 42.

54 Greider, *supra* note 26.

55 *Id.*

The day after it appeared the Vice-President asked his aides to check what was going on "down at the Bureau," and within a matter of days the most troublesome contract, that for Wind River, Wyoming, had been signed; the dam was broken for a time.⁵⁶

At this point the Coalition realized there was a need for continuing coordination and communication. Its members had used the simple power of grass-roots organizing and reasoned that they ought to continue this association. As a result, they decided to create a permanent organization offering Indian communities *Indian* assistance toward educational improvement. To achieve this goal they perceived a need to acquire command of the technical assets intended for their benefit. Despite the good will of agencies and programs with resources for them, they realized that their lack of genuine influence over those resources had resulted in inefficiency and, at times, misdirection of scarce funds. The new organization which they started marked a radical departure from previous efforts at giving Indians legal and other technical assistance in education. It was a group composed of and operated by those who were to benefit from its services. The idea was simple: If an Abe Plummer from Ramah or a Birgil Kills Straight from Pine Ridge, South Dakota (president of the Coalition), or a Frances Le May (member of a community school board in Menominee County, Wisconsin) had acquired experience and knowledge in school reform in their communities, then it made sense to provide a mechanism to make use of this experience and knowledge at other locations. Instead of relying on outside, often non-Indian experts to tell communities what to do, the Coalition with a minimum of in-house professionals as backup proposed to send Abe Plummer, Birgil Kills Straight and Frances Le May. But in order to have a meaningful basis for providing this kind of assistance, the Coalition needed influence in guiding existing programs offering help in reforming Indian education.

Therefore, in the autumn of 1971, the Coalition asked NARF and Harvard for a meaningful voice in running the Indian Education Legal Support Project. Short of turning the project over to the Coalition, the Coalition suggested that one or two lawyers be assigned to work under the Coalition and receive their pay from OEO funds.⁵⁷ Despite the fact that the Coalition's membership was made up of many NARF clients, Harvard and NARF rejected the request on the grounds of insufficient funds. At a meeting in early January, 1972, NARF's director, a non-Indian attorney named David H. Getches, explained that NARF "could not" turn control of the project over to the Coalition or assign it lawyers. He assured the Coalition that its "needs" would be cared for and then proceeded to label the Coalition NARF's "most important Indian education client," promising to consult with it on all major Indian education questions coming to its attention. This promise was repeated in a letter dated June 21, 1972. Charles Wilkinson, the NARF attorney in charge of NARF's part of the Legal Support Project, wrote OEO that:

⁵⁶ Although the quote comes from an independent source, it is substantially confirmed in *The Washington Post*, Nov. 13, 1971, at A2.

⁵⁷ Interview with Gerald Clifford (an Oglala Sioux), Director, Coalition of Indian Controlled School Boards, April 17, 1973.

The Coalition is literally the most important client which our office has on education matters—it would be an extraordinary situation in which we would not accept a request from the Coalition for legal services . . . We will immediately contact the Coalition in regard to any inquiry which we receive concerning Community Controlled Schools.⁵⁸

All this is by way of background for an unfortunate incident which then took place. Almost simultaneously with the letter quoted above, NARF filed a major civil rights class action lawsuit against a local public school district at Shawano, Wisconsin, with a high Menominee Indian enrollment and against the Wisconsin State Department of Education.⁵⁹ In doing so NARF failed to inform either the Coalition or the Indian community's own education committee whose members were part of the class on whose behalf the suit was filed. The committee was a founding member of the Coalition, had been present through its representatives when NARF proffered its "most important client" promise, and had even been assisted in its formation by NARF. In July, 1971, NARF supplied legal assistance to the organizers of the committee. With this help, the committee decided not to file a lawsuit to air their grievances but rather to adopt a two-step, community-action program. Step one called for creation of a community-controlled school to demonstrate local capacity to run an educational program for the numerous pushouts from existing public schools; step two called for reorganizing school district lines to give the homogeneous and geographically separate Indian community dominion over its own schools.⁶⁰

While NARF maintained an attorney-client relationship with this committee through a consulting attorney under the legal support educational grant, an independent group of NARF attorneys visited the community in December, 1971, on a noneducational matter. During the course of their visit, however, the NARF lawyers were approached about some school problems by several Menominee Indians not directly associated with the education committee. Without informing the consulting attorney working with the education committee, the second group of attorneys undertook to represent the people who had approached them and several months later they filed their action—all the while failing to inform the original NARF consulting attorney, the education committee or the Coalition.

Irony is the fact that at the very time the suit was filed, in late May, 1972, the Coalition occupied a basement office at NARF as a temporary headquarters. Although NARF alleges that the incident happened because of "logistical problems" associated with its move ten months previous from Berkeley, California, to Boulder, Colorado, it remains that NARF's attorneys were preparing and filing a significant Indian education law suit upstairs while the Coalition was making telephone calls and typing letters downstairs.⁶¹ This developed at the same time that the committee was entering negotiations with the same officials who were named as defendants in the suit.

58 Letter to OEO dated June 21, 1972, signed Charles F. Wilkinson.

59 *Wilber v. Bd. of Educ. of Joint School Dist. No. 8*, Civil No. 72-C-165 (W.D. Wisc.).

60 Interview with Atlee Dodge, Director, Menominee County Education Committee, Inc., April 1, 1973.

61 Interview with Birgil Kills Straight (an Oglala Sioux), President, Coalition of Indian Controlled School Boards, June, 1972.

The committee has been forced to intervene in the suit to protect its interests, and has thus been put in an adversary position vis-à-vis the state officials it must deal with to bring about reorganization. But that is not the worst of it. According to Atlee Dodge, one of the committee's leaders, an Indian who recently ran for Congress, "What the law suit has done is take local initiative right out of the hands of the people here by having decisions made by NARF attorneys as to whether this area has a school or not."⁶²

The episode implies a failure by NARF to comprehend its obligations to Indian community clients and to their chosen methods of bringing about reform. It further suggests that by failing to implement a structure in its attorney-client relationships allowing for significant client influence, errors such as NARF's undertaking to simultaneously represent two groups of clients who may have competing interests can occur. This is one way NARF has had trouble translating its proposal language into concrete reality.

V. The Organizational Basis for Problems

One avenue of investigation which might be fruitful on the basis of the three events described above is to ascertain whether they represent sporadic problems in responsiveness or are endemic. If, as may be suspected, they are part of a pattern of structural deficiencies in Indian legal services and perhaps in other legal aid programs, then discussion and research ought to center on procedures altering the structures for providing the assistance.

Some preliminary analysis based on the OEO experience in Indian education is justified now although it must be qualified as subjective. The views which follow are suggestive, not conclusive, and invite further investigation by skilled evaluators including most specifically representatives of the programs' grass-roots clientele. Their first focus ought to be on why, despite the abundance of intelligent, skilled and above all well-intentioned lawyers, programs such as Harvard, NARF and DNA have kept initiative from their clients and otherwise neglected their interests in cases such as the ones considered above. It is my suspicion that these programs may not have operated as they should for institutional, organizational reasons. The systems under which these lawyers have operated may have demanded unresponsiveness.

The problem inheres in charity. When one doesn't pay for a service he cannot control it. An indigent client remains passive while do-gooders go to work. DNA, NARF and Harvard represent the Salvation Army approach to technical assistance for the poor. Sometimes the mittens match and sometimes they don't. The result may be professionally satisfying for the lawyer but is often ineffective from the client's standpoint. Even the Ramah case resulted in a legal victory in court—an order directing increased bus service to an alternative public high school 30 miles from Ramah. But that was not what the Ramah people wanted. They wanted their own community school close to home. Examples of this disparity between success in court and substantial social reform may be taken from many fields besides education.

62 Interview with Atlee Dodge, April 1, 1973.

In 1969, for example, DNA filed a federal court action seeking an order to force the Bureau of Indian Affairs to bring trading post monopolies under regulation on the Navajo Reservation. When the U.S. District Court of Arizona dismissed the complaint, DNA appealed and won what at the time was considered a significant victory in the Ninth Circuit.⁶³ Here was proof positive of the efficacy of law reform. Courts *can* be used to bring about meaningful social reform for Indians. Yet four years after the suit was filed nothing has actually changed.

The Federal Trade Commission conducted a study and recently released a report on the trading post system on the Navajo Reservation which, in the words of the *Race Relations Reporter*, is "scathing."⁶⁴ *Newsweek* says the report "charges that traders are cheating and defrauding the 135,000 Navajos while the Interior Department's Bureau of Indian Affairs, which is responsible for regulating the traders on the reservation, ignores the abuses."⁶⁵ The article continues that "[t]o prevent future abuses, the report recommends that supervision of traders be taken away from the BIA and turned over to the Navajos,"⁶⁶ a solution apparently never considered at DNA. (I was employed at DNA when the suit was filed and participated in its preparation. OEO had conducted an evaluation of DNA the month preceding the filing and had criticized DNA for not suing the BIA more frequently. Little attention was paid to alternative solutions to the trading post problem, and the program director ordered that the complaint be prepared against the Bureau without consulting either the DNA board or the tribe.)⁶⁷

On the basis of these experiences it would seem that law reform in its usual meaning—"significant" lawsuits—cannot reach the subtle relationships between the oppressed and the dominant society which constitute the heart of the problem. This inability has led to the absurdity of lawyers urging Indians to take over their own schools while denying them control of the technical resources needed to do it. The inability stems from failure to address a basic question: What happens to a lawyer's fiduciary duty when his client's interest demands he take over his lawyer's functions? In my observation, legal services have simply failed in many cases to see their roles as transitional; that having nurtured a client's capability to help himself, it is the lawyer's obligation to remove himself. Eventually he must leave his client in command of his own destiny. This pattern is especially germane to professionals as distinguished from nondegree-holding

63 *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971).

64 Sheppard, *Turning Back Cuts In Social Services*, 4 RACE RELATIONS REPORTER, No. 13 at 2 (1973).

65 NEWSWEEK, June 25, 1973, at 74.

66 *Id.*

67 But see, e.g., *McClanahan v. Tax Comm'n of Arizona*, 411 U.S. 164 (1973), which held that Arizona may not tax the personal incomes of Indians living and working on Indian reservations. DNA has been moderately successful in using the law reform technique to strengthen Navajo tribal sovereignty with regard to the states in which the reservation is located. NARF has also been successful to a degree in preventing state encroachment on Indian rights; see, e.g., *Pyramid Lake of Paiute Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972). In other areas of litigation the successes have not been plentiful. One exception is a companion case to a lawsuit filed this year in Federal District Court by the Coalition seeking release of federal funds for Indian education under Title IV of the Higher Education Act of 1972, Pub. L. No. 92-318, 86 Stat. 270: *Redman v. Weinberger* and *Minnesota Band of Chippewas v. Weinberger*, F. Supp. (D.D.C. 1973).

workers for the poor. I have noticed, for example, that many VISTA volunteers on the reservation who were neither lawyers nor educators nor professional social workers developed a keen understanding of the amorphous psychological syndromes affecting the people with whom they worked. They understood that initially the central problem facing the oppressed is the outside do-gooder himself.

An explanation for the disparity between purpose and attainment of legal services in Indian education independent of the peculiar mind-set of professionals relates to organizational behavior. OEO's resources were given to institutions rather than to individuals. (The VISTA example is apt. There volunteers for the most part worked for no middle man but were assigned directly to community organizations. Although the payment mechanism still interfered with firsthand accountability—the VISTAs got government checks—the individuality of their roles may have helped shield them from the danger of making decisions for others.) Simply stated, organizations do not normally terminate themselves voluntarily; even when they become anachronistic and even, curiously enough, when they acknowledge contradictions between their operations and funding. Self-liquidation is probably rare because organizations honestly tend to equate their interests with those they serve. The competition for funds and prestige which has surfaced between the Coalition and Harvard-NARF is probably due to the latter's insistence that *its* work is essential to benefit its clients. It is a proprietary instinct. Once, when the Coalition asked NARF for legal assistance anonymously (to protect the Coalition's own future fund-raising), NARF refused: "We have to be realistic," said a NARF spokesman. "We have to get our bread some way too."⁶⁸

The organizational framework of the OEO Indian education legal grant has led to development of a we-they view. The Coalition, though springing from close association with NARF, has become an outsider. It has been treated as anything but a client. In reality, as soon as a group of NARF's clients banded together to form a separate entity they were perceived by NARF as a "they." Since then NARF and Harvard in varying degrees have declaimed the Coalition as a more legitimate community spokesman than themselves. When first approached about sharing control of the OEO grant with the Coalition, Marian Wright Edelman, the Harvard Center's director at the time, asked, "How do I know the Coalition is legitimate? How do I know whether their claim to be a grass-roots Indian organization is correct?"⁶⁹ The answer was twofold: first, that Harvard had no business questioning their client's legitimacy; and second, that no other Indian group was competing on the same basis for recognition. The Coalition was the only group claiming to be composed of and acting as a limited spokesman for grass-roots Indians in education across the country.⁷⁰

68 Interview with Gerald Clifford, *supra* note 57.

69 Interview with Marian Wright Edelman, November 29, 1971, Cambridge, Massachusetts.

70 The issue of who speaks for communities pervades poverty law and government theory in general. The view favored by the author is that anybody who claims to speak for a community ought to be given the benefit of a positive presumption that he does, unless his claim is patently absurd or until someone else appears with better credentials. But this was not the issue relative to the Coalition, which was Harvard-NARF's client and which alone of Indian organizations claimed to be a spokesman for grass-roots Indians on education.

Analyzing organizational behavior is a delicate process because it necessarily calls for dealing with individuals. Organizations act, think, and speak through individuals. To learn more about how organizations confuse their own interests with those of their clients, it is imperative to take as material the acts or expressions of individuals. It is with this in mind that several written comments of the directors of the Harvard Center and NARF should be reviewed.

A. Competition for Control

In May, 1972, disagreement occurred between Harvard and NARF about future control of the OEO Indian education money. NARF's former director, David Getches, wrote a letter to OEO proposing that NARF take over complete control of the project. In the letter he listed a key reason why NARF should be given full control—its "sensitivity" to Indian needs and wishes:

Fund attorneys are continually in contact with Indian tribes and communities throughout the country. This contact, besides making them aware of particular legal problems, sensitizes them to the things which Indian people feel are important and the approaches to the problems which they think are desirable.⁷¹

This claim bears an astonishing resemblance to the standard BIA justification for its manipulation of Indian lives: its "closeness" to Indian people.⁷² Both NARF and the BIA substitute physical proximity to Indians for substantive program control by Indians. This substitution is a classic example of the confusion so prevalent in benevolent institutions such as NARF between organizational self-interest and clients' interests.

Harvard's former director, Marian Edelman, who it should be noted assumed her position after OEO had funded the Indian Education Legal Support Project and had nothing to do with the way the grant had been made, wrote a response. In it she reveals yet another institutional handicap which may be prevalent in programs based on professional service; i.e., professional elitism which assumes that no one is qualified to develop solutions to problems unless he has a diploma. In Harvard's letter to OEO defending its participation in the project the distinction made is between "service to Indian people and groups," conceded to be important and within NARF's bailiwick (primarily because of its geographical location), and "program development,"⁷³ a research function for which Harvard is best suited primarily because Harvard

... has an ability to think through programs in Indian education in order

⁷¹ Getches, *supra* note 38.

⁷² The BIA has recently decentralized its contacting procedures. Until April, 1973, Indian Contract Schools could negotiate with high BIA officials in Washington. Now they must deal with local BIA Area Directors, who often have interests in preserving their own bureaucracies contrary to Indian interest in taking over Bureau functions. The BIA's justification for the decentralization is to bring decision-making in the BIA "closer" to the people. In a meeting on April 10, 1973, with representatives of the Coalition of Indian Controlled School Boards, the Interior Department's Assistant to the Secretary for Indian Affairs, Marvin L. Franklin, stated that he believed local Bureau personnel were better able to make decisions affecting Indians than the administrators in Washington, D.C.

⁷³ Letter to OEO dated May 17, 1972, signed by Marian Wright Edelman.

to enable other groups (her emphasis) to choose to act in ways they think important. . . . I do not think NARF has the expertise to engage in long-range and thoughtful development in Indian education.⁷⁴

It is questionable whether action and contemplation, especially in poverty programs, can ever be successfully separated. First, the separation is bound to leave clients completely out of planning; second, it is questionable whether theory can ever be productive in social relations if not firmly rooted in particular human situations. Harvard's performance would suggest not. Its geographical and cerebral distance from the field has prevented it from becoming fully acquainted with its clients, as shown by an incident in December, 1971, shortly after the Coalition's triumph over the BIA in the Wind River case.

In that month Harvard called a meeting⁷⁵ to discuss amendments to regulations under an important Indian education law, the Johnson-O'Malley Act. No one from the Coalition had been invited. But Abe Plummer, representing the Coalition, attended anyway and became angered when no one from Harvard could adequately explain why the Coalition was not on the guest list. One of its attorneys lamely pleaded that he had tried to call the Coalition's president, Birgil Kills Straight, an Oglala Sioux from Pine Ridge, South Dakota, but failed to reach him. He was then asked why he had not tried calling anyone else from the Coalition, Abe Plummer for instance, who was sitting right next to him. The attorney fidgeted at which Plummer, no novice when it comes to bureaucracies, turned to the director of the Harvard Center sitting on his other side, looked her in the eye, pounded his fist on the table, and in a low, decisive voice said: "You don't even know who we are! You don't even know who we are!"

Based on these glimpses of the inner institutional workings of legal assistance in Indian education, one tentative conclusion to be drawn is that the problem does not stem from Mr. Agnew's perception that these programs are "tax-funded social activism." The problem is that it is the *lawyer's* activism. The lawyer enjoys the choices. The lawyer establishes decision-making environments for his clients. (I well remember my first few weeks at Ramah thinking how wonderful it was that the Ramah Navajo School Board was making all the decisions for the school. I did not realize that by presenting circumstances requiring decisions to them and then defining possible alternatives, I was effectively influencing the Board's own dynamics and hence their decisions.) He who controls initiative controls everything. Thus DNA, which rarely deferred to true client control, was mostly smoke and little fire. There was no genuine revitalization going on, no revolution, as its name implied or its staff claimed. The Ramah Navajo School succeeded largely despite DNA; not because of it.

B. Conflicting Interests of the Poor

Another set of problems arises when the Government and the programs confuse the interests of some of the poor with those of other groups of poor. When OEO, for example, gives the Harvard Center money to help "the poor"

⁷⁴ *Id.*

⁷⁵ The author was present at this meeting.

with "education problems" and then avoids careful guidelines as to how choices of clients, cases, and tactics are to be made, it invites development of internal conflicts. Such may have happened at Harvard because of its heavy commitment to integration, a tangential interest at best in Indian education.

In her letter to OEO, Marian Edelman seems to lump all of Harvard's client communities together:

What Harvard staff can offer is broad experience and contact with labor, education, civil rights groups without whose help Indian education is going to end up being an aside. The realities of Washington is [*sic*] that blacks alone, Indians alone, have no power. It is within the framework of broader coalitions based on mutual interest that real help is going to come.⁷⁶

Elsewhere she previously said:

Just as the basic hope for blacks in the South to get a fair share of resources is through desegregation, it can be convincingly argued that in the North only by binding the destiny of other groups to blacks on educational matters can a strong enough force for adequate resources be mounted.⁷⁷

Intragroup unity among the aggrieved is commendable in theory. But Indians and blacks may not share interests that give a coalition meaning unless it be based on a precise understanding of the importance of flexibility in planning social reordering. By and large Indians are not confronted with forcible *exclusion* (segregation) from society as are blacks. Their problem has been almost the reverse—forcible *inclusion*; or in the words of the Special Senate Subcommittee, "coercive assimilation [has been the] dominant policy of the Federal Government towards Indians."⁷⁸ It "has resulted in the destruction and disorganization of Indian communities and individuals [and has led to] the classroom and the school becoming a kind of battleground where the Indian child attempts to protect his integrity, and identity as an individual by defeating the purposes of the school."⁷⁹ White America has perceived and treated Indians differently from blacks, as the Subcommittee recognized:

Ever since the policy of educating Indians in public schools was adopted, it was assumed that the public schools, with their integrated settings, were the best means of educating Indians. The subcommittee's public school findings—high dropout rates, low achievement levels, anti-Indian attitudes, insensitive curriculums—raise serious doubts as to the validity of that assumption.⁸⁰

⁷⁶ Edelman letter, *supra* note 73.

⁷⁷ Edelman, *The Debate Over School Desegregation*, THE NEW REPUBLIC, March 21, 1970, at 27. The statement is one of a series of responses to an article published in THE NEW REPUBLIC on February 7, 1970, by Professor Alexander M. Bickel of Yale Law School. His article was one of the first to raise the question whether integration should or even can be carried beyond legal desegregation to implement racial balance in schools and whether talents and resources might not be better directed towards improving substantive educational programs and granting minorities greater control over them.

⁷⁸ Senate Rept., *supra* note 15, at 21.

⁷⁹ *Id.*

⁸⁰ *Id.* at 31.

The failure to see distinctions between the black experience and Indian experience leads to a policy-making fallacy: that similar solutions apply to the predicament of both groups. This becomes plain not only because the record of Indian education in "integrated" schools is so poor, but also because Indians have always received public resources by reason of their special relationship to the federal government. Indians are the only ethnic group for whom the Government has unique, fiduciary obligations arising in part from the Constitution itself.⁸¹ The resulting system of federal services to Indians is a prized resource despite the flaws of the BIA. Hence, there is almost universal aversion among Indians to termination of services based on that special relationship. The Menominees of Wisconsin, for example, date the tragic decline of their children's education to the 1961 termination—the date their children were systematically "integrated" into a white-controlled school district.⁸² For traditional Indians, at least, remaining sociologically and politically distinct has almost universally been conceived of as the only way to social justice.

For now it is unimportant who is right about integration and self-determination. What is important is that disjunctive interests between different groups in society are being perceived. The former Harvard director has said, for example, that "those who are softening on integration are now grasping at community control as an alternative,"⁸³ while *Wassaja*, a new Indian newspaper published by the American Indian Historical Society, says in its very first editorial, "If we were to define the one strategic need of our people it would have to be self-determination."⁸⁴ When attempting to represent both points of view, as Harvard gives the impression of doing, it is put in a very awkward position, bordering on a conflict of interest.

Although this conflict of loyalties may not have resulted in concrete, specific harm to either Indians or blacks, the fact remains that the issue apparently has never been seriously debated at Harvard or OEO. Client communities may therefore be justified in assuming that one reason for Harvard's seeming lack of enthusiasm for the "strategic need" of Indian people is its heavy commitment to another broad mechanism for social justice.

C. *The Law Firm Analogy*

While NARF does not suffer from Harvard's dual loyalties, it too has organizational deficiencies, which it shares with numerous other legal services programs. These concern corporate structure and social theory. NARF is supposedly governed by a "steering committee" of Indians.⁸⁵ Yet the committee does not really have full control of the operation because, according to David Getches, NARF is a "law firm" and outside influence would be in violation of the attorney-client relationship.⁸⁶ The degree of control such a steering committee

81 U.S. CONST. art. I, § 8; *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971).

82 Interview with Atlee Dodge, *supra* note 62.

83 Edelman, *supra* note 77, at 27.

84 *The Indian's Signal for Self-Determination*, *Wassaja*, Jan. 1973 (editorial).

85 NARF Bylaws, undated.

86 Interview with then director David H. Getches, Boulder, Colorado, March 2, 1972.

should have is the issue. Any resulting power vacuum is usually filled by NARF attorneys.

NARF is *not* another White and Case or Arnold and Porter. Persistent invocation of the law firm analogy merely shields NARF lawyers from undue influence from anybody outside the staff on such questions as whom to represent, what lawsuits to file, and what strategy to employ—even though many of these questions have a profound impact on Indian politics and policy.

The curiosity is that Getches acknowledges the peculiar and sensitive nature of legal work among Indians.⁸⁷ In the May, 1972, issue of the *NLADA Briefcase* he writes in an article entitled "Difficult Beginnings for Indian Legal Services" that:

It is quite difficult for a typical non-Indian attorney who is a newcomer to the reservation and to the community to make the delicate policy judgments concerning what cases should and should not be taken in order to avoid an infringement of the tribe's governmental prerogatives.⁸⁸

Yet it seems he is unable to take the next logical step and embrace the need for turning over real power to Indian clients to make decisions. Instead he proposes that Indian legal services simply hire more Indian lawyers.⁸⁹ In this instance NARF's inability to think through its position closely resembles its previous reaction when confronted by the Coalition's demands for increased influence over the Legal Support Project. At that time NARF failed to suggest anything more meaningful than "close consultation" between the Coalition and the project. NARF failed to see that the funding flaws in that grant sprang from reliance on the consulting-with-Indians technique. None of NARF's responses to problems it concedes to exist rise to the level of restructuring the service mechanisms.

This inconsistency relates to both the historical way non-Indians have treated Indians—as passive beneficiaries at best—and to the structure through which NARF operates. This structure seems responsible for placing so much pressure on NARF lawyers to maintain an independent status answerable to no one but an ill-defined group of clients. "Indeed," continues the former director, "it would be improper for attorneys, whose primary duty is to represent individual clients, to take into account interests other than those of the client."⁹⁰

This rationale might be acceptable if NARF really were a law firm. But NARF and other legal services programs are quite *dissimilar* to private law firms. The former are separate institutions and enterprises with their own goals, political programs and strategies. These are assumed to coincide with the interests of the poor, but as we see in Indian education, often do not. The law firm comparison breaks down in each of the elements essential for making and keeping private lawyers from engaging in activities contrary to their clients' interests:

⁸⁷ Getches was NARF's founding director and chief guiding light until the spring of 1973 when he resigned as director and was replaced by former staff attorney John Echohawk, a Pawnee from New Mexico. Getches remains on NARF's staff as an attorney.

⁸⁸ 30 *NLADA BRIEFCASE* 181, 184 (1972).

⁸⁹ *Id.*

⁹⁰ *Id.*

1. First and foremost, a law firm charges fees. If a client is unhappy with the service he gets, he hires another lawyer. The payment mechanism is the basic tool for ensuring professional excellence. Not so in legal services. These are all charitable monopolies which stake out a field and protect their domination over it as ruthlessly as any international cartel. According to Edgar and Jean Cahn, this "monopoly power can be and is rationalized in numerous ways by men of good will: they are doing their best; they are providing important services and goods; ingratitude should not be allowed to reflect on their professional integrity."⁹¹ Yet the good will has not prevented a growing awareness that the interests of legal services programs may sometimes be antagonistic to those of their clients, as the Cahns pointed out as early as 1966: "And slowly, but surely, neighborhood law firms, while paradoxically shedding light in an effective manner on the problems of the poor have already begun the long road to unresponsiveness."⁹² Furthermore, poverty lawyers' paychecks come every two weeks no matter how they perform. In the year and a half I worked at DNA, for example, not a single lawyer was discharged for incompetence based on a client's complaint, although several were fired for irritating the director. DNA evaluations were sponsored by OEO and were carried out by other poverty lawyers.⁹³ These teams spent most of their time asking DNA's staff how well they thought they were doing. In an article on public interest lawyers in 1970, the *Yale Law Journal* summed up the situation: "if the client is not paying the lawyer, [the client] is deprived of a pecuniary sanction and a psychological advantage."⁹⁴

2. Wall Street and Washington firms are likely to employ attorneys of the same social class and educational background as their clients. Informal relationships between big-time lawyers and their well-heeled clients are common. Martin Mayer, author of *The Lawyers*, confirms this noting that corporate lawyers "have far more personal contact with their clients than the outside world realizes."⁹⁵ In this intimacy a client can almost always rest assured that his lawyer will studiously avoid any action contrary to his interests.

But a legal services client is usually from a lower economic level. He is also from a culture and ethnic group which in many cases is different from his lawyer. Besides, he is uneducated. He cannot communicate effectively with his lawyer. And finally, he has always had problems with people behind desks, and is hence reluctant or unable to judge his lawyer's performance. He is, says

91 Cahn & Cahn, *supra* note 10, at 1323.

92 Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAWYER 927 (1966).

93 OEO now claims to include representatives of clients on evaluation teams.

94 Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1005, 1012 (1970).

95 M. MAYER, *THE LAWYERS* 308 (1970). In NLADA BRIEFCASE, *supra* note 88, the point is made that legal services lawyers serving Indians are generally very close to their clients socially. The opposite is true in my experience. Far from having a congenial, informal relationship with most clients, DNA lawyers generally lived in government-built compounds by themselves and affected either a BIA, split-level life-style or a hippyish, back-to-nature mode, both quite alien to most DNA clients. NARF and Harvard lawyers, on the other hand, are stationed so far from most of their clients that personal intimacy must be extremely rare between them, if it exists at all.

the *Yale Law Journal*, "more deferential to the lawyer and more vulnerable to his control."⁹⁶

3. Wall Street and Washington firms have no independent boards or directors vying with clients for the lawyer's attention, interest, and loyalty. NARF, DNA, and Harvard have such boards. Although the boards seldom are in actual control of legal operations, they do exercise influence. At the very least they act as shields, protecting the lawyers from criticism from outside the program.

The Cahns summarize this relationship between corporate structure and effectiveness by claiming that OEO legal programs have concentrated on the service function to the almost total exclusion of the "capital investment" (self-help) approach.⁹⁷ As a result, they conclude,

Poverty lawyers, without realizing the implications of their elitism, unwittingly become part of the vast bureaucracy charged with the care and tending of the poor and lacking in any accountability to the poor. In some instances, legal services programs have been gravely unresponsive to major needs, concerns and grievances of the client population—as unresponsive as the very institutions that have been a source of injustice to the poor.⁹⁸

D. *An Inappropriate Model*

These failures probably relate to the theoretical models on which the programs were built: the southern civil rights organizations. In 1968 the Ford Foundation, a principal supporter of the NAACP Legal Defense and Education Fund, decided to spawn an Indian equivalent. It sent questionnaires to all Indian legal services programs asking for ideas and suggestions about how to organize, finance and administer such a project.⁹⁹ (Characteristically, in its "best and brightest" tradition, the Ford Foundation directed its query to the experts, the lawyers, and not to Indians.) The response from NARF's parent organization, California Indian Legal Services (CILS) was considered best so it was given an initial grant to build the program. Only after the project was basically outlined did CILS choose an Indian steering committee, and then the first selection was made by CILS lawyers after a mass mailing was made soliciting candidates.

The southern civil rights programs are inappropriate models for organizations such as NARF for two reasons: (1) the differing nature of the problems and (2) the way the programs are funded. The southern programs were concerned primarily with integration, a measurable, quantifiable commodity. (You can count the numbers of blacks in school or on a bus.) But in Indian affairs, especially education, the issues are only peripherally legal or quantifiable. (There is no mathematical way to calculate or measure "coercive assimilation" or the harm it does.) Moreover, the southern programs were agreed on using lawsuits as a fundamental strategy. In Indian education, as the Ramah and Gallup cases demonstrate, lawsuits are seldom efficient in implementing reform.

⁹⁶ 79 YALE L.J., *supra* note 94, at 1123.

⁹⁷ Cahn & Cahn, *Power to the People or the Profession? — The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1012 (1970).

⁹⁸ *Id.* at 1041.

⁹⁹ For some insight into the grantmanship required for a Ford Foundation grant, see Foster, *Playing It Safe on \$11 Million a Year*, 3 JURIS DOCTOR 6, 9-17 (1973).

The second way in which the two programs differ from their southern predecessors is in the method by which they are funded. All of the funds for the Harvard and NARF Indian Education Legal Support Project come from the Government. Both are susceptible, therefore, to governmental pressure. The southern programs were never forced to count on public funds. Thus, they never had to contend with governmental influence. They were never subject to the built-in contradiction inherent in publicly funded poverty projects: the discrepancy arising from an inconceivability that the government, as Mr. Agnew candidly concedes,¹⁰⁰ would keep on paying for revolution against itself.

Having ample warning of this built-in contradiction, all legal services programs, not just Harvard and NARF, should long ago have planned and carried out a program to make the poor as self-sufficient as possible. Only such a strategy would afford poor people a foundation for progress toward social and economic equality after the smart OEO lawyers depart. But self-help conflicts with a cherished belief of poverty lawyers in the efficacy of lawsuits as the best means for social reform.¹⁰¹ Try as they will, it seems Harvard and NARF lawyers have been unable to implement the very means for helping Indians in education which they emphasize in their own proposal.

This inability to radically alter the methods by which legal assistance is provided seems fundamentally related to the framework in which legal services lawyers operate. These structures, which almost uniformly keep clients from exercising significant influence in their cases, make even well-intentioned, bright attorneys unresponsive. The questions which result relate to the future. What implications should be drawn from this one area of poverty law work and what changes can be made to ensure that legal assistance for the poor and oppressed is successful?

VI. Conclusion

Initially, given the overwhelming, undeniable failure of the War on Poverty in general—the poor are still very much with us—the chances are that many of the flaws in the “Indian Education Legal Support Project” can be found in other programs. Until legal services programs are restructured to make lawyers accountable to clients, continued abuses of the kind described in this article are inevitable.

¹⁰⁰ Agnew, *supra* note 3.

¹⁰¹ For a discussion of law school training and its deficiencies in terms of poverty law, see Cahn & Cahn, *supra* note 97, at 1025-31. Or see G. REICH, *THE GREENING OF AMERICA* 150-51 (1970):

At a higher and more tragic level, one can observe the violent alienation of law students from their prior selves. Finding themselves in law school for many possible reasons, they discover that they are expected to become “argumentative” personalities who listen to what someone else is saying only for the purpose of disagreeing, “analytic” rather than receptive people, who dominate information rather than respond to it; and intensely competitive and self-assertive as well. Since many of them are not of this sort of personality before they start law school, they react initially with anger and despair, and later with resignation as their self-alienation becomes complete. In a very real sense they “become stupider” during law school, as the range of their imagination is limited, their ability to respond with sensitivity and receive impressions is reduced, and the scope of their reading and thinking is progressively narrowed.

The need for altering the mechanisms for providing assistance as argued here contrasts with the views of Harvard's former director, who is quoted as having said: "I think the way we [a public interest project] handle our guilt feelings about the theoretical, technical nature of the constituency is by *making* ourself responsive."¹⁰² In my view close inspection of public interest lawyers will demonstrate that individuals can rarely "make themselves accountable"; only systems can do that.

Along with structural changes legal training and orientation in cultural differences need to be offered to poverty lawyers. A self-help strategy requires a radical alteration in the way poverty lawyers view themselves. As a group we tend to be apocalyptic. Like knights on white chargers we smite evil Indian traders, ghetto slumlords, car dealers, and bureaucrats who stand in the way of justice as we see it. We eschew the subtle approaches and self-effacement essential to community organizing. (The toughest thing for me at Ramah was subordinating myself to the School Board.) We tend to confuse venting of our spleens with venting of clients' spleens.

It is not that efforts at providing legal assistance to Indians in education or the poor in general should be concluded; they should be channeled so as to serve the interests and requirements of the clients as clients see them rather than as professionals see them. *Above all, resources must be put in the hands of the poor so they can hire their own experts.*

Only then can a basic paradox of legal aid come under some kind of control, a paradox stemming from the conflict between a lawyer's traditional role as advisor, seer, and representative and the Indian (and other people's) goal of self-determination. There is a very real antithesis between an Indian's belief in his own power to control his life and the lawyer's historic practice of solving problems for others.

Until professional skills are employed for the poor to enable them to run their own lives, the inherent contradiction of experts giving aid to the poor can never be overcome. And just so long as legal services programs remain structured as they are will their assistance resemble the mittens knitted by little old ladies back East for those poor Indian children out on the reservation.

102 79 YALE L.J., *supra* note 94, at 1129 (emphasis in original).